Filed 6/8/17 P. v. Solis CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER SOLIS et al., Defendants and Appellants.	B269472 (Los Angeles County Super. Ct. No. BA431884)

APPEALS from judgments of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed in part, vacated in part and remanded in part.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Alexander Solis.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Daniel A. Gomez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Alexander Solis and Daniel Gomez (defendants) appeal following their jury trial which resulted in their convictions for one count of robbery (Pen. Code, § 211).[1] The jury found true the allegations that defendants committed the robbery for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1) and that defendants personally used a firearm in the commission of the robbery within the meaning of section 12022.53, subdivisions (b) and (e)(1). After he was convicted of robbery, Solis pled no contest to one misdemeanor count of causing injury to his girlfriend (§ 273.5, subd. (a)). The trial court sentenced Solis to a total of 16 years in state prison, consisting of a one-year term for the section 273.5 conviction, plus the upper term of five years for the robbery conviction plus a 10-year enhancement term pursuant to section 12022.53. The trial court sentenced Gomez to a total of 15 years in state prison, consisting of the upper term of five years for the robbery conviction plus a 10-year enhancement term pursuant to section 12022.53.

Defendants contend there is insufficient evidence to support the true finding on the gang allegation and the trial court erred prejudicially in permitting the prosecution's gang expert to offer his opinion on their state of mind and guilt on the gang enhancement. Respondent agrees the trial court erred, but maintains the error was not prejudicial. Both defendants request that we independently review the sealed transcript of the *Pitchess*[2] motion hearing.

Solis individually contends there is no evidence to support the jury's finding that he personally used a firearm. Gomez individually contends there

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1 Further undesignated statutory references are to the Penal Code.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

is insufficient evidence to prove that he was one of the robbers; assuming he was one of the robbers, there is insufficient evidence to show that he used the firearm against the victim. Gomez also contends the court made improper dual use of facts in sentencing him to the upper term for the robbery conviction and that this error requires a remand for resentencing. Respondent agrees the trial court erred, but contends no remand is necessary. Gomez requests that we independently review the sealed affidavit supporting the search warrant for his residence and the related in camera proceedings to determine if the trial court erred in sealing the affidavit and/or denying his motion to traverse and quash the warrant and suppress evidence. Each defendant joins in the other's gang-related arguments to the extent applicable.

There is substantial evidence to support Gomez's robbery conviction and the true findings on both enhancements as to each defendant. The trial court did err in admitting some of the gang expert's testimony, but the error was harmless. We have reviewed the in camera hearing on the *Pitchess* motion and the sealed search warrant and supporting affidavit which Gomez moved to traverse and cross. We find no error in the trial court's rulings on those motions. The trial court did use Gomez's firearm possession twice at sentencing, and the error is not harmless. We vacate Gomez's sentence and remand for a new sentencing hearing. We affirm the judgments of conviction in all other respects.

BACKGROUND

In the morning of November 29, 2014, defendants approached 60-year-old Jose Mora at Obregon Park in East Los Angeles. Solis punched Mora in the face multiple times. Gomez pulled a gun. Defendants grabbed cash from Mora's shirt pocket. Mora had blurry vision and was bleeding; it was later

determined that he had suffered a concussion. He was nevertheless able to get into his truck and drive away. As he left, someone threw a hard object at his truck, shattering the windshield.

Within 10 minutes of the robbery, Mora flagged down Los Angeles County Sheriff's Security Officer Henry Jimenez at Belvedere Park and gave his initial account of the robbery. According to Officer Jimenez, Mora said he had been robbed by a male Hispanic who was about five feet eight inches tall with tattoos. He indicated the gun used in the robbery was a black semiautomatic handgun. Officer Jimenez called paramedics and put out a broadcast to law enforcement. The crime was outside his jurisdiction.

In response to a radio call, Los Angeles County Sheriff's Deputy Aaron Abellano and his partner met with Mora at Belvedere Park. Mora appeared shaken up. He had fresh injuries to his face, which were bleeding. Mora provided additional, and occasionally different, details of the robbery to Deputy Abellano. Mora said that after he had walked around Obregon Park, he started to get into his truck but was stopped and robbed by two men, one of whom had a handgun. Mora said the man with the gun pointed the handgun into his rib cage. Mora said he did not know the caliber of the gun. Mora estimated that the robbery occurred at about 9:46 a.m.

Mora described the unarmed man as a shirtless male Hispanic about five feet three inches tall and 140 pounds. The man had a tattoo of the Virgin Mary on one side of his chest and a tattoo of the devil on the other side. The tattoos were not colored. Mora described the man with the gun as about 23 to 25 years of age, with brown eyes, about five feet four inches tall and weighing about 180 pounds. He had a black bandanna covering his head.

The Sheriff's Department made an immediate attempt to locate the robbery suspects. Deputy George Sauers, who was on patrol at Obregon

Park, heard a call describing one of the robbery suspects and detained Gomez. Deputy Sauers patted down Gomez for officer safety, but did not find any weapons. The deputy released Gomez after determining that he did not have tattoos on his chest.

Gang Detective Jesse Lucero also heard a radio call about the robbery and detained Solis around noontime about half a mile from Obregon Park. Detective Lucero knew Solis to be an El Hoyo Maravilla (HMV) gang member with tattoos on his chest. Solis has a tattoo of a devil on one side of his chest and a long-haired man framed by roses on the other. Solis had very fresh abrasions on his knuckles and $147 in cash in his pockets, including a $50 bill. Mora later identified the $50 bill as the one that had been stolen from him. The bill was old and distinctive.

Detective Lucero interviewed Mora later that day. Mora's account of the robbery differed slightly from his previous versions. Mora described both robbers as Mexican men between 20 and 25 years old. He described the gunman as five feet five inches to five feet six inches, and "skinny." He estimated the gunman's weight as 155 to 165 pounds. The second robber was shorter, about five feet four inches tall. Mora described the gun as a revolver with white grips. When asked if the gun was large, Mora replied, "Yes, a revolver like a .22 or I don't know what, you know." Mora stated the gunman pulled the gun and "put it on me." He stated that the unarmed robber hit him in the temple and also broke his tooth.

Detective Lucero showed Mora a six-pack photographic lineup during the interview and Mora identified Solis as the robber who hit him. Ten days later, Mora identified Gomez from a six-pack photographic lineup as the robber who had the gun.

Police obtained a search warrant for Gomez's residence. They found a .22-caliber revolver with white grips in Gomez's bedroom. Detective Lucero, who had recovered more than 500 firearms in his career, testified that such a gun was "extremely unique."

Detective Lucero testified at trial as a gang expert, testifying in particular about HMV, one of the oldest Hispanic criminal street gangs in Los Angeles. The gang's primary activities were robbery, drug sales, weapons possession, assault, vandalism, attempted murder and murder. Obregon Park, where Mora was robbed, is in the heart of HMV's claimed territory.

The detective knew Solis and Gomez to be members of HMV at the time of the robbery. Gomez was one of Solis's Facebook friends and Solis had commented on some of Gomez's gang-related postings on Gomez's own Facebook page.

Detective Lucero opined that the robbery was committed at the direction of, for the benefit of, and in association with the HMV gang, and that defendants robbed Mora with the intent to assist, further, and promote the gang.

Gomez called a number of witnesses in his defense. He offered the testimony of Officer Jimenez, summarized above, to show that Mora's initial account of the robbery differed from his later accounts. Gomez also presented the testimony of Kathy Pezdek, an expert on eyewitness testimony. She explained that stress may prevent accurate memories; an identification is more likely to be accurate if made shortly after an event; memories fade over time; and an eyewitness's confidence in his identification is not a good indicator of the accuracy of the identification.

Gomez's high school football coach testified that Gomez had been a "good kid" who was always respectful. The coach opined that Gomez did not have a violent character. The coach, a resident of Boyle Heights, stated that there were no gang problems at his high school, but acknowledged he had heard that HMV controlled Obregon Park and that it was really the only gang there.

Gang expert Martin Flores also testified on Gomez's behalf and challenged Detective Lucero's description of Obregon Park as a known hangout for HMV. He claimed that members of other gangs also frequented the park and HMV gang members went to the park to play sports in a "nongang" capacity. Flores opined that it would be unlikely for a gang member to keep a weapon he had used in a crime in his home.

Solis did not call any witnesses or present any evidence in his defense.

DISCUSSION

I. Sufficiency of the evidence—Gomez's robbery conviction

Gomez contends Mora's identification of him was not sufficiently reliable to meet the prosecution's burden of proving him guilty of robbery beyond a reasonable doubt. He contends specifically that the victim's identification was "equivocal and conflicting." Gomez maintains such a conviction violates his state and federal constitutional rights to due process.

A. Law

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

It is well settled that, in reviewing a sufficiency of the evidence claim, we defer to the trier of fact's evaluation of credibility. It is also well settled that the testimony of a single witness is sufficient for the proof of any fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

"In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 161-162.) "Purported weaknesses in identification testimony of a single eyewitness are to be evaluated by the [trier of fact]." (*People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.)

"To warrant the rejection by a reviewing court of statements given by a witness who has been believed by the trial court or the jury, there must exist either a physical impossibility that they are true, or it must be such as to shock the moral sense of the court; it must be inherently improbable and such inherent improbability must plainly appear. [Citations.]" (*People v. Ozene* (1972) 27 Cal.App.3d 905, 910.)

B. Specific claims

Gomez identifies the following flaws in Mora's pretrial identification: (1) the six-pack shown to Mora was "overly" suggestive; (2) Mora did not identify Gomez from the six-pack until 10 days after the robbery and after he had suffered severe head trauma; (3) Gomez was at the park on the day of the robbery and so Mora might have seen Gomez before the robbery and identified him as the robber only because he looked familiar; and (4) Mora gave different descriptions of the gunman to law enforcement officials.

Gomez identifies the following flaws with Mora's trial testimony about the gunman: (1) Mora gave different accounts of events at the preliminary hearing and at trial, including descriptions of the gunman which differed from each other and from his earlier descriptions to law enforcement officials; (2) Mora testified that while he was being punched, he covered his face with his arms and could not see; (3) Mora testified that his vision was blurry due to the punches and his diabetic condition; (4) Mora testified that he generally cannot see very well and has to look at things close up; and (5) Mora identified Gomez in court only after being asked three times if he saw Gomez.

C. Analysis

We have reviewed the photographs used in the lineup. The lineup was not suggestive. Photograph 3 does show a man who appears to be older than the other five men in the photographic lineup, and whose head does have a slightly different appearance than the other men. This man is not Gomez. Any unsuitably of the older man simply turns the lineup into a five-person lineup rather than one with six persons. Six is not a magic number, and there is nothing inherently suggestive about a five-person lineup.

None of the other "flaws" in Mora's identification of Gomez renders his identification physically impossible or inherently improbable. For example, Mora's pretrial descriptions of the gunman varied only slightly, by a few pounds in weight, inches in height or years in age. As for his vision, Mora testified that he is able to see clearly without glasses for at least 39 feet, but even if he could only see well close up, the robbers came within inches of him during the robbery. Although Mora had difficulty locating Gomez at a distance in the courtroom, Mora picked Gomez out of photographs within seconds.

There is no doubt that Mora was not a good witness at trial, and there were variations in his account of the robbery and description of the robbers throughout his testimony. Mora was, at various times, confused, uncooperative and argumentative. The trial court admonished him several times. There could be many reasons for Mora's behavior on the witness stand, including fear, lack of memory, brain damage and dishonesty. It was the jury's task to evaluate Mora's demeanor on the witness stand and decide which, if any, of his pretrial statements or trial testimony to believe. "In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment . . . .' [Citation.]" (*People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 161-162.)

Further, Mora's testimony was not the only evidence connecting Gomez to the robbery. The gun used by the robber was distinctive and unusual, and a gun matching the description of the robber's gun was found in Gomez's bedroom. Gomez was in the area of the crime near the time of the crime. Mora's identification of Solis as one of the robbers was very strong, and was corroborated by Solis's injured knuckles and possession of a $50 bill identical to the one stolen from Mora. Gomez was linked to Solis through their common gang membership and through social media activity.

Mora's testimony, together with this corroborating evidence, is "reasonable, credible, and of solid value" and a reasonable trier of fact could find Gomez guilty beyond a reasonable doubt based on that evidence. Because we have determined that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

II. Sufficiency of the evidence—use of a handgun

Gomez contends that even assuming he was the robber carrying a handgun, there is insufficient evidence to show that he used the gun in the commission of the robbery. He specifically contends Mora's testimony about the gun was equivocal and contradictory. He maintains the true finding on the firearm enhancement violates his state and federal constitutional right to due process.

We review the sufficiency of the evidence to support a true finding on an enhancement using the same standard that applies to review of a conviction. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) As is the case with a conviction, a true finding which is not supported by substantial evidence violates a defendant's state and federal constitutional rights. (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947.)

A defendant uses a firearm in the commission of a crime within the meaning of section 12022.53 if he intentionally displays the gun in a menacing manner, fires it, or hits another person with it. (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42.)

As Gomez points out, Mora gave differing descriptions of the gun to different law enforcement officials. In addition, Mora told law enforcement officials that Gomez placed the gun against him, but testified at the preliminary hearing that Gomez kept the gun in his waistband and he saw it when Gomez lifted his shirt. At trial, Mora testified that Gomez hit him with the gun and broke his tooth. Mora also testified both that he saw the gun before he was hit with it and did not see the gun before he was hit.

As we discuss in section I above, there is no doubt that Mora was not a cooperative or consistent witness. It was the jury's task to evaluate Mora's demeanor on the witness stand and decide which, if any, of his pretrial

statements or trial testimony to believe, however. "In our limited role on appeal, '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment' . . . . [Citation.]" (*People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 161-162.)

The record shows that Mora stated before trial that Gomez was the robber holding the gun, and also testified at trial that Gomez was the gunman. Mora testified that Gomez hit him in the mouth with the gun. This act constitutes a use of the gun within the meaning of section 12022.53,[3] and is substantial evidence from which a reasonable trier of fact could find true beyond a reasonable doubt the allegation that Gomez used a firearm in the commission of the robbery. Accordingly, "the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband, supra,* 13 Cal.4th at p. 690.)

III. Gang enhancement—both defendants

Defendants contend there is insufficient evidence to support the true finding on the gang enhancement and that such a finding violates their state and federal constitutional rights to due process and a fair trial. They maintain that because the robbers did not wear gang colors, announce the name of their gang, make gang signs or in any way announce their gang membership, the crime must have been for defendant's personal gain. They claim the testimony of the prosecution's gang expert is too speculative to support the jury's finding.

We review the sufficiency of the evidence to support a true finding on a gang enhancement using the same standard that applies to review of a

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[3] The prosecutor pointed to Mora's statement that the gun knocked out a tooth as a fact showing Gomez's use of the gun during the robbery.

conviction. (See *People v. Vy, supra,* 122 Cal.App.4th at p. 1224.) For gang enhancements, "the typical close case is one in which one gang member, acting alone, commits a crime." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Section 186.22, subdivision (b) requires that (1) the defendant commit the charged crime for the benefit of, at the direction of, or in association with, the gang and (2) he do so with the specific intent to promote, further, or assist any criminal conduct by the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 51.)[4] The requirement that the crime be committed for the benefit of, at the direction of, or in association with a criminal street gang is intended to make it clear that the crime must be gang related. (*Id*. at p. 60.)

There is substantial evidence from which a jury could infer that defendants committed the robbery for the benefit of, at the direction of, or in association with their gang, and thus satisfied the first prong of the gang enhancement. "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048, quoting *People v. Albillar*, *supra*, 51 Cal.4th at p. 63.)

Detective Lucero opined on redirect examination that two HMV gang members "committing a crime in Obregon Park is going to benefit" HMV for

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[4] Section 186.22, subdivision (b)(1) states that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony . . . be punished" as further specified.

"all the reasons" he had stated "time and again."[5] As defendants point out, this opinion is quite broad and vague. An expert opinion that a crime was committed for the benefit of, at direction of, or in association with a gang is not a prerequisite for a true finding on a gang allegation, however. A jury "may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) Detective Lucero's testimony about the history and culture of the HMV gang was detailed, specific and based on his personal experience, and it provided a solid basis for the jury to infer that the robbery was committed for the benefit of HMV.

Detective Lucero explained the importance of territory to a gang, and the gang practice of intimidating people who live in their territory, by committing crimes against them and targeting them if they report crimes to the police. He stated, "As long as the gang maintains its reputation in the community that it calls its territory, as long as it perpetuates violence, as long as it commits crimes, as long as it makes it known that if anybody reports to the authorities . . . they can face retribution. . . . That is what keeps persons within the community from calling us and letting us know about the gang-related crimes that actually happened." In the detective's experience, he had a more difficult time having witnesses come forward in what is known as gang territory as opposed to nongang territory.

Detective Lucero also explained that on a recurring basis, higher ranking members of HMV will speak to younger gang members and tell

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[5] As we discuss in more detail in the next section of the opinion, Detective Lucero also opined specifically that defendants committed the robberies for the benefit of HMV. This testimony was improper and we do not consider it in evaluating the sufficiency of the evidence to support the gang enhancement.

them, "We need to get the gang name out there more. These people need to know that this is El Hoyo Maravilla's turf. We will not tolerate any other gangs and we will only tolerate persons not reporting crimes when we commit them." Generally, gang members are expected to [t]ake advantage of the opportunities provided" and to use a "hood gun" if they had one. They are expected to "[c]reate missions" and keep the gang name out there."[6]

Thus, a jury could infer from the detective's properly admitted general expert testimony about gang culture and habits that gangs value having their own territory and benefit when their members commit violent crimes in that territory because it intimidates people living in the area and reinforces the gang's control of their territory.

Detective Lucero also provided specific information about Obregon Park, where the robbery occurred. He explained that the park was in the heart of HMV territory, and had been claimed by HMV for decades, for as long as documented records of the gang in East Los Angeles patrol station existed. It is an area where HMV gang members "can go and feel without impunity they can do illegal acts, sales of narcotics, stash narcotics, possibly trade and move narcotics around."

In Detective Lucero's experience, the citizens of an area know if the area is a gang's territory, and know the identity of the gang. This is particularly true when the gang has been in the area for generations. People living in the area have often been around the same amount of time and know who the gang members are. HMV was such a well-established gang. It is one

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6 Detective Lucero gave the above-excerpted testimony as part of a longer explanation for his improper specific opinion testimony that defendants committed the charged robbery in association with and at the direction of HMV. The testimony cited above, however, was phrased in general terms. It is, as the trial court recognized, testimony about "gang culture generally."

of the oldest gangs in Los Angeles County, dating back seven generations to the 1940's. HMV had been in East Los Angeles for at least as long as the Sheriff's Department had been patrolling the area and keeping records.

Defendants chose to commit robbery, a primary activity of HMV, in broad daylight in the heart of HMV territory. Although defendants did not identify themselves as HMV gang members, the jury could infer from Detective Lucero's testimony that many people living in the area knew the park was claimed by HMV, and knew who many of the gang members were. A jury could also reasonably infer that defendants did not believe that they needed to announce their gang affiliation in order to be recognized as HMV gang members, and thereby to reap the benefit of committing a crime in gang territory.

Finally, a jury could reasonably infer that bystanders in the park did in fact recognize defendants as HMV gang members. Mora testified that there were people in the park but no one helped him. There is nothing in the record to indicate that any bystander later came forward to assist police in their investigation either.

It is true that a jury could also reach the opposite conclusion. "'[I]it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.' (*People v. Morales, supra,* 112 Cal.App.4th at p. 1198.)" (*People v. Albillar, supra*, 51 Cal.4th at p. 62.) That possibility does not require reversal, however. "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the

reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"'" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

The second requirement of the gang enhancement, the specific intent requirement, is easily established in cases where, as here, a defendant commits the charged felony with someone he knows to be a fellow gang member. As the California Supreme Court has explained, "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar, supra,* 51 Cal.4th at p. 68.) That is the case here. There is substantial evidence showing that defendants knew each other before the robbery and each was aware of the other's gang membership. They committed the robbery together.

There is substantial evidence to support the jury's true finding on the gang enhancement. Accordingly, "the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband, supra,* 13 Cal.4th at p. 690.)

IV. Improper opinion testimony

Defendants contend, and respondent agrees, that the prosecutor improperly asked Detective Lucero to give an opinion on whether defendants committed the robbery for the benefit of the gang, and the detective gave such an opinion. The parties agree that the prosecutor should have asked his question in the form of a hypothetical based on the facts of this case, and the detective should have opined on the actors in the hypothetical, not defendants. We agree as well.

Defendants contend the error was so prejudicial that it violated their state and federal constitutional rights to due process and rendered the trial fundamentally unfair. We do not agree.

A. Law

An expert may not testify directly that a defendant committed a crime for gang purposes. The expert may "express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. (*People v. Albillar, supra,* 51 Cal.4th at p. 63.)" (*People v. Vang, supra,* 52 Cal.4th at p. 1048.)

The reason for the rule prohibiting expert testimony regarding whether a specific defendant acted for a gang reason "is *not* that such testimony might embrace the ultimate issue in the case. 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (Evid. Code, § 805; see *People v. Prince* [2007] 40 Cal.4th [1179,] 1227; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370–1371.) Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. . . . '"[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; see also *People v. Prince, supra,* at p. 1227.)" (*People v. Vang, supra,* 52 Cal.4th at p. 1048.)

As our Supreme Court has explained, when a defendant claims that an expert gave improper opinion testimony on the question of guilt and so violated the defendant's constitutional rights to a fair trial, the defendant's claim is, "in substance, one of erroneous admission of evidence, subject to the standard of review for claims of state law error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 76.) Under this standard, an appellate court reviews the entire record to "determine if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.]" (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1140.)

B. Testimony

Defendants identify the following two exchanges between the prosecutor and Detective Lucero as resulting in improper opinion testimony:

Over defense counsel's objection, the prosecutor asked Detective Lucero, "[D]o you have an opinion on whether this robbery was done for the benefit of, the direction of, or association with the El Hoyo Maravilla street gang?" Detective Lucero replied that he did have an opinion, and the prosecutor asked, "What is your opinion?" Detective Lucero stated, "It was in fact done for all those reasons for the gang."[7]

Later, over defense counsel's objection, the prosecutor asked Detective Lucero, "Do you have an opinion of whether the defendants were acting with

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[7] Before defense counsel's objection, the prosecutor had asked a more detailed version of his question, as follows: "You investigated this case from beginning to end, you sat here through all the testimony. Sir, based on everything that you've heard in your investigation, do you have an opinion of whether or not this robbery was done for the benefit of, the direction of, or the association of El Hoyo Maravilla?" After the objection was overruled, Detective Lucero asked if the prosecutor could ask the question again, and the prosecutor asked the slightly shorter question quoted above.

the specific intent to assist, further, or promote El Hoyo Maravilla?" The detective replied, "My opinion is this was for all those factors."

C. Analysis

There is no reasonable probability that defendants would have received a more favorable outcome in the absence of the improper testimony.

On redirect examination, the prosecutor asked, "Two El Hoyo Maravilla gang members committing a crime in Obregon Park is going to benefit El Hoya Maravilla; correct?" Detective Lucero replied, "Yes, sir." The prosecutor asked, "For all the reasons you stated time and again?" Detective Lucero replied, "Yes, sir." Thus, the jury heard the gang expert's admissible opinion that a hypothetical crime committed under circumstances matching those alleged in this case were gang related. (See *People v. Ewing* (2016) 244 Cal.App.4th 359, 382 [erroneous admission of improper gang expert opinion testimony harmless when hypothetical properly admitted].)

Gomez maintains that an expert's opinion that a defendant is guilty is not simply unhelpful to the jury, but can also be "too helpful, in that the testimony may give the jury the impression that the issue had been decided and need not be the subject of deliberation." (*People v. Prince, supra,* 40 Cal.4th at p. 1227.)

The jury instructions in this case made it clear that an expert's opinion did not decide the gang issue and did not relieve the jury of its duty to deliberate on this issue. The jury was instructed generally that it was the exclusive judge of credibility. (CALJIC No. 2.20.) The jury was specifically instructed that an opinion is only as good as the facts and reasons on which it is based; the jury should consider if a fact has been proved or not in determining the weight to give an expert opinion; and the jury should consider the strengths and weaknesses of the reasons given as well. The jury

was expressly told that it was not bound by an expert's opinion; it should decide what weight to give any opinion; and it could disregard any opinion it found unreasonable. (CALJIC No. 2.80.) (See *People v. Prince, supra,* 40 Cal.4th at p. 1229 [expert's status as law enforcement official not likely to cause jury to abandon its fact finding function "especially in light of the guidance offered to the jury by the court's jury instructions"].)

In addition, Gomez offered the testimony of his own expert on gang culture and the issue of whether a gang benefits from a crime similar to the one in this case. Thus, the jury was presented with two conflicting views on the gang benefit issue, and had to chose between them. There is no reasonable probability (or possibility) that the jury believed the issue had been decided and it did not need to deliberate on the subject.

Gomez also argues, based on language in federal cases, that the testimony of police officers "'often carries an aura of special reliability and trustworthiness.' *United States v. Gutierrez,* 995 F.2d 169, 172 (9th Cir. 1993)." (*Picazo v. Alameida* (9th Cir. 2004) 90 Fed.Appx. 512, 514.) Solis similarly argues, also based on language in federal cases, that expert testimony "can be both powerful and quite misleading because of the difficulty in evaluating it." (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 595.) This may be true in some cases, but was not true here.

In *Picazo*, the only experts on gang activities at trial were prosecution witnesses. (90 Fed.Appx. at p. 514.) Here, Gomez offered his own gang expert, and that expert's testimony provided a solid basis to evaluate Detective Lucero's testimony. In *Daubert*, the expert's testimony concerned whether a particular drug could have caused specific birth defects in two children. (509 U.S. at p. 584.) Here, Detective Lucero's testimony involved

observation of the behavior of gangs and residents of gang areas over time and conclusions drawn from that behavior. These types of underlying facts and analysis are not nearly as difficult to evaluate as the underlying scientific evidence and conclusions at issue in *Daubert*. [8]

Gomez and Solis contend the evidence was very strong that they committed the crime for a personal reason. The only evidence they point to is their failure to identify themselves as HMV gang members. As we discuss in section III above, given the circumstances of the crime, self-identification was unnecessary. As we also discuss in more detail in section III above, the evidence supporting the true finding on the gang enhancement is very strong. Thus, there is no reasonable probability that defendants would have received a more favorable outcome in the absence of Detective Lucero's improper expert testimony.

V. Firearm enhancement—Solis

The Count 1 verdict form for second degree robbery for Solis read: "We further find the allegation that in the commission of the above offense, the defendant, ALEXANDER ARTURO SOLIS, personally used a firearm, to wit, a HANDGUN, within the meaning of Penal Code section 12022.53(b) to be: True." Solis contends there is no evidence that he personally used a handgun in the commission of the robbery. He maintains that a true finding based on insufficient evidence violates his state and federal constitutional rights to due process and a fair trial and requires reversal.

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[8] The issue before the Court in *Daubert* was whether expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra*, 509 U.S. at pp. 584-585.) That issue is not implicated in this case.

A. Enhancement law

Section 12022.53, subdivision (b), provides that "any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years."

When the underlying felony is gang related within the meaning of section 186.22, subdivision (b), however, another provision of section 12022.53 must be considered. Section 12022.53, subdivision (e)(1) provides that subdivision (b) applies to *any* person who is a principal in the commission of an offense if it is pled and proved that (1) the person committed a gang-related offense within the meaning of section 186.22, subdivision (b) and (2) *any* principal in the crime personally used a firearm.[9]

B. Pleading requirements

The information in this matter alleged in count 1 that Solis committed robbery and that "a principal personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b) and (e)(1)." The information also alleged in count 5 that Gomez committed robbery and that "Gomez personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b)." The information further alleged that "pursuant to Penal Code section 186.22(b)(1)(C) as to count(s) 1 and 5 that the above offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote,

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[9] Section 12022.53, subdivision (e)(1) provides in full: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

further and assist in criminal conduct by gang members." Thus, the pleading requirements of section 12022.53, subdivision (e)(1) were met in this case.

C. Proof requirement

The jury found true the allegations that Solis and Gomez committed the robbery for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b) and thus satisfied the first proof requirement of section 12022.53, subdivision (e)(1).

The jury found true the allegation that Solis "personally used a firearm" in the commission of the robbery. Solis contends that this finding does not satisfy the second proof requirement of section 12022.53, subdivision (e)(1). He contends that subdivision required the jury to make a specific finding on the verdict form for Solis that "a principal" personally used a firearm.

It is well settled that "'"[a] verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court." [Citations.]' (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256.)" (*People v. Jones* (1997) 58 Cal.App.4th 693, 710.) The form of the verdict is generally immaterial so long as the jury's intentions are apparent. (*People v. Paul* (1998) 18 Cal.4th 698, 706–707.) "'[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice.'" (*People v. Jones,* at pp. 710-711.)

Here, the prosecutor argued in both his opening and closing statements that the evidence showed that one robber had a gun, and that robber was Gomez. Neither defense counsel suggested that more than one gun was involved in the robbery.

The jury found both Solis and Gomez guilty of robbery, and thus found as a matter of law that both men were principals in the robbery. (§ 31.) The jury instructions ensured that the jury was aware that if defendants were guilty of robbery, they were principals in that crime. The instructions stated, "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime."

The jury found true the allegation that Gomez personally used a firearm in the commission of the robbery, and, as we discuss above, there is substantial evidence to support that finding. Since Gomez was a principal in the robbery, the jury's true finding that Gomez personally used a firearm in the commission of the robbery was also a finding that a principal personally used a firearm in the commission of the robbery. While Solis is correct that this precise finding does not appear on his verdict form, that is elevating form over substance. The law does not require such formality. (See *People v. Paul, supra,*18 Cal.4th at pp. 706-707 ["Because section 12022, subdivision (a)(1), provides that a defendant is 'armed' . . . if a principal is armed in the commission of the offense, whether or not the defendant personally is armed, when such an allegation occurs in a count of an information jointly charging two codefendants with the underlying offense, a verdict or finding that as to the substantive count in which both codefendants jointly are charged, a principal was armed in the commission of the offense, establishes that both jointly charged defendants are subject to the arming enhancement." There is no need for a separate verdict naming each defendant separately.].)

The intent of the jury is clear. The jury was instructed in pertinent part that the "term 'personally used a firearm,' as used in this instruction, *means* that the defendant *or* a principal must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it." (Italics added.) Although the evidence showed that only one defendant personally used a firearm, the jury was presented with one set of verdict forms for Solis, which stated that he personally used a firearm, and another set for Gomez, which stated that he personally used a firearm. The jury had no option on any verdict form to expressly find that "a principal" personally used a firearm. Thus, in finding true two "personal use" allegations where only one defendant had a gun, the jury must have intended its finding that one of the defendants "personally used a firearm" to encompass the alternate meaning set forth in the jury instructions, that is, that a principal personally used a firearm. Since the evidence showed that Gomez was the robber with the gun, the jury's finding as to Solis must have been intended to find that a principal used a firearm. (See *People v. Trotter* (1992) 7 Cal.App.4th 363, 369-370 [where information alleged defendant personally used a firearm, jury was instructed on personal use and parties' arguments "coincided with the instructions," but verdict form used the phrase "armed with a firearm," the wording on the verdict form was not dispositive and enhancement for personal use was properly imposed].)

There is substantial evidence to support the jury's implied findings. Accordingly, "the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband, supra,* 13 Cal.4th at p. 690.)

VI. Dual use of facts in sentencing

Gomez contends the trial court improperly used his possession of a firearm both to support the upper term for the robbery conviction and to support the 10-year firearm enhancement. Respondent contends Gomez waived this claim by failing to object in the trial court.

A. Forfeiture

Respondent is correct that Gomez has forfeited the claim by failing to object at sentencing. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies to claim that trial court double-counted a sentencing factor]; *People v. deSoto* (1997) 54 Cal.App.4th 1, 7-9 [improper dual use of sentencing facts claim waived by failure to object]; *People v. Erdelen* (1996) 46 Cal.App.4th 86, 91 [same].)

Gomez contends that if his claim has been forfeited by his counsel's failure to object, he received ineffective assistance of counsel.

A defendant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, at p. 694.)

B. Law—sentencing factors

"[A] court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).) Thus, "a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has

discretion to strike the punishment for the enhancement and does so." (Cal. Rules of Court, rule 4.420(c).)

When a defendant claims the trial court made an impermissible dual use of a fact to support both an enhancement and an aggravating factor, "the reviewing court looks at whether the trial court *could have* based the aggravating factor on evidence *other* than that which gave rise to the enhancement. If so, the sentence may stand. [Citation.]" (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) If the trial court could only have based the aggravating factor on the evidence giving rise to the enhancement, that aggravating factor cannot stand. (See *ibid*.)

"'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error."' [Citation.]" (*People v. Osband, supra,* 13 Cal.4th at p. 728.) Since only a single valid aggravating factor is required to support the upper term, resentencing is not required where (1) there are valid aggravating factors identified to support the upper term and (2) the record does not show a reasonable probability that the trial court would have selected a different valid aggravating factor if it had been aware the originally selected factor was not valid. (*Id*. at p. 729.)

C. Court's statement

After hearing argument from all parties, the court stated: "Just a quick word on the circumstances in aggravation. The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. Also, the manner in which the crime was carried out indicates planning, sophistication, or professionalism."

The court next discussed mitigating factors for each defendant: "So, Mr. Gomez has, if not a completely nonexistent criminal history, it's a minimal one, all things considered. . . . However, if I look at the overall circumstances of this crime, certainly Mr. Gomez . . . was the one with the firearm. And whereas otherwise I would be inclined to sentence him to less than the high term, I'm not for that reason."

D. Analysis

The trial court clearly used Gomez's possession of a firearm to support both the enhancement and an aggravating factor, a use which is not permitted. Trial counsel acted deficiently in failing to object to this usage.

Respondent points out that the trial court identified at least two factors in aggravation in addition to the gun use factor and so it is not reasonably probable that Gomez would have received a more favorable sentence if the firearm-based aggravating factor had been stricken. We recognize that there are other aggravating factors, but we cannot ignore the trial court's express statement that Gomez "was the one with firearm. And whereas otherwise I would be inclined to sentence him to less than the high term, I'm not for that reason." This statement makes it reasonably probable that Gomez would have received a more favorable sentence if his trial counsel had objected to the dual use of the firearm. Accordingly, we remand the matter for a new sentencing hearing for Gomez.

VII. *Pitchess* Motion

Defendants request that we independently review the sealed transcript of the in camera hearing on Gomez's *Pitchess* motion for discovery of peace officer personnel records, which Solis moved to join in the trial court. Respondent does not object to this request.

The trial court granted Gomez's motion for discovery of "falsifications in reports. Misrepresentations." On July 21, 2015, the court conducted an in camera review of the deputies' records. No records were produced.

When requested to do so by a defendant, we independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) We have reviewed the transcript of the in camera hearing and conclude that the trial court did not abuse its discretion in determining that there were no relevant records to disclose to Gomez or Solis.[10] (See *People v. Hughes* (2002) 27 Cal.4th 287, 330 [court's ruling is reviewed for abuse of discretion].)

VIII. Sealed search warrant affidavit

Gomez requests that we independently review the search warrant affidavit, including the sealed portions, as well as the in camera hearing proceedings regarding his motions to quash and traverse the warrant. Respondent does not oppose the request.

A. *Hobbs* procedure

The California Supreme Court has set forth the procedures to be followed where, as here, due to the sealing of a portion of the search warrant affidavit, the defendant cannot reasonably be expected to make the preliminary showing required to move to traverse the warrant, or make an informed determination whether sufficient probable cause existed for the search, in preparation for a motion to quash the warrant. (*People v. Hobbs* (1994) 7 Cal.4th 948.) In such cases, the defense should make a properly

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[10] The clerk of the superior court has filed a certificate with this Court stating that the clerk could not locate within its files the records reviewed by the trial court during the *Pitchess* hearing.

noticed motion seeking to quash or traverse the search warrant. The court should then conduct an in camera hearing. (*Id.* at p. 972.)

The court must first determine whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. The court should then determine whether the extent of the sealing of the affidavit or any major portion thereof is necessary to avoid revealing the informant's identity. (*People v. Hobbs, supra,* 7 Cal.4th at p. 972.) "The court, therefore, must take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires." (*Id.* at p. 973.)

If an affidavit is found to have been properly sealed and the defendant makes a challenge to traverse the warrant, "the court should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing. Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made 'knowingly and intentionally, or with reckless disregard for the truth,' and (2) 'the allegedly false statement is necessary to the finding of probable cause.' [Citation.]" (*People v. Hobbs, supra*, 7 Cal.4th at p. 974.)

If the defendant has moved to quash the search warrant pursuant to section 1538.5, "the court should proceed to determine whether, under the 'totality of the circumstances' presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was 'a fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant." (*People v. Hobbs, supra,* 7 Cal.4th at p. 975, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) In reviewing the

magistrate's decision to issue the warrant, it is settled that the warrant can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause. (*People v. Hobbs,* at p 974.) If the court determines, based on its review of all the relevant materials, that the affidavit and related materials furnished probable cause for issuance of the warrant, the court should simply report this conclusion to the defendant and enter an order denying the motion to quash. (*Ibid*.)

On appeal, because portions of the search warrant and affidavit are sealed, we review Gomez's motion to traverse or quash the warrant de novo. (*People v. Hobbs, supra,* 7 Cal.4th at pp. 975, 977.)

B. Court's ruling

At the beginning of the hearing on Gomez's motion, the court explained that it had unsealed the warrant, reviewed it and "concluded that perhaps more was sealed than necessary, but a portion of it will remain sealed, and in that portion there is sufficient information to allow me to rule on your motion." The court added, "[M]y impression is that the portion of the affidavit that I'm unsealing is known from the police reports and the preliminary hearing, with the exception of the statement of background and qualifications from the affiant which is so common in search warrant applications."

The court then provided the prosecutor the opportunity to review the unsealing before the warrant was turned over to Gomez's defense counsel. Following a brief recess, the court explained, "[The prosecutor] came back to chambers with . . . Detective Lucero, who I believe is the affiant of the search warrant, and . . . the detective pointed out an area he thought should remain sealed, and I agreed."

The prosecutor had provided a copy of the redacted warrant to Gomez's defense counsel. Counsel stated that she wished to proceed with the motion and did not need a continuance. The court then explained, "I have concluded that there was probable cause and the warrant was properly issued."

Defense counsel then asked if "the information established the sufficient reliability of the confidential informant, such that it would give rise to probable cause." The court replied that it did. Defense counsel also asked "whether or not the confidential informant might be deemed a potentially material witness in this case." The court replied that "there is no reason for me to believe that that person is a material witness who could provide any exculpatory evidence." The court ruled that "the defense motion to traverse and quash the search warrant is denied."

C. Analysis

During this appeal, Gomez sought to have the record augmented to include a transcript of the in camera review involving the prosecutor and Detective Lucero. The Los Angeles County Superior Court reporter has certified that apart from the public proceeding reported at pages 301 to 310 of the augmented Reporter's Transcript for August 7, 2015, no further proceedings were held on the record on that date.

We note that there does not appear to be a copy of the final redacted version of the search warrant and affidavit given to the defense in the record on appeal. Accordingly, we rely on the trial court's description of what it unsealed: the portion that "is known from the police reports and the preliminary hearing, with the exception of the statement of background and qualifications from the affiant which is so common in search warrant applications." Our own review shows that the remainder of the search warrant and affidavit concerns the confidential informant, either directly or

indirectly, and also shows there are sufficient grounds to maintain the confidentiality of the informant's identity. There is nothing to suggest the confidential informant would be a material witness. We find those portions to be properly sealed.

We find nothing to indicate that the search warrant or affidavit contain any false statements material to a probable cause finding. We find an adequate basis for the informant's reliability, and note that the informant's statements were substantially corroborated. We also find that the informant's information which was relevant to the probable cause determination was based on personal knowledge. Given all the circumstances set forth in the affidavit, there was a fair probability that evidence would be found in Gomez's residence. Accordingly, the trial court did not err in denying Gomez's motion to traverse and quash the search warrant.

DISPOSITION

The judgment against Solis is affirmed. Gomez's sentence is vacated and this matter is remanded for a new sentencing hearing. The judgment against Gomez is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J. CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.